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No. 89-1146

# In The
# Supreme Court of the United States
## October Term, 1989

THOMAS E. BROECKL, JAMES A. BROWN AND ROBERT D. PHELPS III, INDIVIDUALLY, AND ON BEHALF OF THOSE SIMILARLY SITUATED,
*Petitioners*

*v.*

THE CHICAGO PARK DISTRICT, A UNIT OF LOCAL GOVERNMENT,
*Respondent*

## BRIEF FOR THE CHICAGO PARK DISTRICT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Whether petitioners have waived their right to have this Court review the constitutionality of a municipal fee system under the Fourteenth Amendment's Equal Protection Clause, when petitioners deliberately refrained in the courts below from relying on that Clause and instead based their equal protection claim solely on the Illinois Constitution's equal protection provision.

2. Whether the Illinois Supreme Court correctly held that the Chicago Park District has a rational basis for charging nonresidents of Chicago a higher price than it charges residents to rent recreational boat moorings in the District's harbors.

3. Whether petitioners' "public trust doctrine" theory presents any federal question so as to invoke the appellate jurisdiction of this Court.

## TABLE OF CONTENTS

QUESTIONS PRESENTED ..... i

JURISDICTION ..... 1

STATEMENT OF THE CASE ..... 2

REASONS FOR DENYING THE PETITION ..... 4

A. Petitioners Have Waived Their Federal Equal Protection Argument ..... 4

B. Petitioners' New Federal Equal Protection Claim Has No Merit in Any Case ..... 6

C. Petitioners' "Public Trust Doctrine" Argument Presents No Federal Claim ..... 10

CONCLUSION ..... 12

APPENDIX ..... 1a

1. Table of Authorities and pages 12-29 from petitioners' opening brief in the Illinois Supreme Court ..... 1a

2. Table of Authorities and pages 12-20 from petitioners' reply brief in the Illinois Supreme Court ..... 24a

## TABLE OF AUTHORITIES

**Cases:** *Page*

*Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371 (1979) ..... 6, 7, 9

*Bankers Life & Cas. Co. v. Crenshaw*, ——— U.S.———, 108 S.Ct. 1645 (1988) ..... 5

*Borough of Neptune City v. Borough of Avon-By-The-Sea*, 294 A.2d 47, 61 N.E.2d 296 (1972) ..... 11

*Broeckl v. Chicago Park District*, 170 Ill.App.3d 1063, 524 N.E.2d 1045 (1st Dist. 1988) ..... 3

*Broeckl v. Chicago Park District*, ——— Ill.2d ———, 544 N.E.2d 792 (1989) ..... 4

*County Board of Arlington, Va. v. Richards*, 434 U.S. 5 (1977) ..... 8

*Gibson v. Unites States*, 166 U.S. 269 (1897) ..... 10

*Martinez v. Bynum*, 461 U.S. 321 (1983) ..... 6-9

*Michigan v. Long*, 463 U.S. 1032 (1983) ..... 4

*Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977) ..... 10

*People ex rel. Scott v. Chicago Park District*, 66 Ill.2d 65, 360 N.E.2d 773 (1976) ..... 11

*Phillips Petroleum Co. v. Mississippi*, ——— U.S. ———, 108 S.Ct. 791 (1988) ..... 10, 11

*Shapiro v. Thompson*, 394 U.S. 618 (1968) ..... 7, 8

*Starns v. Malkerson*, 401 U.S. 985 (1971), *summarily affirming* 326 F.Supp. 234 (D.Minn. 1970) ..... 7

*Sturgis v. Washington*, 414 U.S. 1057 (1970), *summarily affirming* 368 F.Supp. 38 (N.D. Wash. 1973) ..... 7

*Vlandis v. Kline*, 412 U.S. 441 (1973) ..... 6

*Webb v. Webb*, 451 U.S. 493 (1983) ..... 5

## CONSTITUTIONAL PROVISIONS AND STATUTES

United States Constitution,
Fourteenth Amendment,
Equal Protection Clause ..... 2-7, 9

Illinois Constitution of 1970,
Article IV, Section 2 ..... 3

28 U.S.C. §1257(a) ..... 1

Ill.Rev.Stat. ch. 105,

§§ 333.19, 333.39 ..... 2

Ill.Rev.Stat. ch. 105,
§333.23n ..... 2

Ill.Rev.Stat. ch. 105,
§333.23n(g) ..... 2

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THE CHICAGO PARK DISTRICT, A UNIT OF LOCAL GOVERNMENT,
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## BRIEF FOR THE CHICAGO PARK DISTRICT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

### JURISDICTION

The judgment of the Illinois Supreme Court was entered on September 20, 1989. Petitioners purport to base jurisdiction of this Court on 28 U.S.C. §1257(a), which gives this Court jurisdiction to review State court final judgments construing the constitutionality of a State statute under the federal Constitution.

Respondent Chicago Park District denies that this Court has jurisdiction. The petition purports to seek this Court's review of

the constitutionality of an Illinois statute (1) under the Fourteenth Amendment's Equal Protection Clause, and (2) under the Illinois "public trust doctrine." The District's position is that by failing to make their Fourteenth Amendment claim in the courts below, petitioners waived their right to present it to this Court. The District further asserts that petitioners' "public trust doctrine" claim presents no federal question.

## STATEMENT OF THE CASE

Petitioners filed this class action in an Illinois State court to challenge the fees charged by the Chicago Park District for renting boat moorings in the District's recreational harbors along Lake Michigan. Petitioners presented two challenges to the fees. First, petitioners asserted that the District was required to set the level of the fees at "cost." The "at cost" claim, which petitioners lost, invoked only Illinois law and is not asserted in the petition. Second, petitioners challenged the District's 25% fee surcharge for nonresidents of Chicago. The trial court held this surcharge unconstitutional, but the Appellate Court of Illinois reversed, and the Supreme Court of Illinois affirmed the Appellate Court. Petitioners seek this Court's review.

The facts are not disputed. The Chicago Park District is an Illinois municipal corporation. It owns and operates Chicago's park system. The District finances its operations primarily by taxes levied on property within the city limits of Chicago. Ill.Rev.Stat. ch. 105, §§333.19, 333.39.

The Illinois legislature has authorized the District to construct recreational boat harbors along Lake Michigan and to charge boaters for the use of harbor facilities. *Id.*, §333.23n. The same statute provides that "fees charged to nonresidents need not be the same as fees charged to residents of the district." *Id.*, §333.23n(g). Pursuant to this authorization, the District has constructed over 5,000 boat moorings in eight recreational harbors. It rents those moorings to boaters on a seasonal basis. Its fee levels are competitive with those of other marinas on Lake Michigan. To the basic seasonal fee, the District adds a 25% surcharge (the "nonresident surcharge" ) for nonresidents of Chicago. This price distinction is the only measure taken by the District to promote its own residents' access to its harbor

moorings. Notwithstanding the surcharge, about half the moorings have been rented by nonresidents of Chicago.

Petitioners' complaint in the trial court listed various federal and Illinois constitutional provisions that were allegedly violated by the nonresident surcharge. Among these, petitioners listed the federal Constitution's Privileges and Immunities Clause, Art. IV, §2; the Fourteenth Amendment's Equal Protection Clause; and various provisions of the Illinois Constitution. Petition 33a.

The complaint's single mention of the federal Equal Protection Clause was the last time petitioners invoked that Clause in this litigation until they filed their petition for *certiorari* in this Court. Although their complaint mentioned the Equal Protection Clause, the only federal constitutional provision actually argued by petitioners to the trial court was the Privileges and Immunities Clause. On October 7, 1985, the trial court held unconstitutional the nonresident surcharge and the statute authorizing it. The court did not state what provision of what Constitution the surcharge offended. Petition 27a.

The District appealed this ruling to the Illinois Appellate Court. In defending the trial court's ruling, petitioners did not argue that the nonresident surcharge offended the federal Equal Protection Clause. As in the trial court, the only federal constitutional provision petitioners argued in the Appellate Court was the Privileges and Immunities Clause. The Appellate Court, reversing the trial court, upheld the constitutionality of the nonresident surcharge. *Broeckl v. Chicago Park District*, 170 Ill.App.3d 1063, 524 N.E.2d 1045 (1st Dist. 1988), Petition 14a-23a.

Petitioners appealed to the Illinois Supreme Court. Once again, the only federal constitutional provision invoked by petitioners was the Privileges and Immunities Clause. Petitioners' briefs in the Illinois Supreme Court did not argue, or even mention, the federal Equal Protection Clause. (The relevant sections of those briefs are reprinted as an appendix to this brief.) Petitioners made an equal protection argument, but expressly limited that argument to the equal protection guarantee contained in the Illinois Constitution. See pp. 12a-15a and 33a-35a, *infra*.

The Illinois Supreme Court affirmed the Appellate Court's ruling upholding the constitutionality of the nonresident surcharge. *Broeckl v. Chicago Park District,* ___ Ill.2d ___, 544 N.E.2d 792 (1989), Petition 1a-13a. First, the court held that as Illinois residents, petitioners had no standing to invoke the federal Constitution's Privileges and Immunities Clause. 544 N.E.2d at 110, Petition 10a. Second, the court rejected petitioners' equal protection challenge. Although petitioners had based their equal protection argument only on the Illinois constitutional provision, the court stated that the surcharge was constitutional not only under that provision but under the federal Equal Protection Clause as well. *Id.* at 111, Petition 11a-12a. Third, the court rejected petitioners' contention that the surcharge violated the Illinois "public trust doctrine." *Id.* at 111, Petition 12a.

## REASONS FOR DENYING THE PETITION

There are three reasons to deny this petition. First, petitioners have waived their claim that the nonresident surcharge violates the Fourteenth Amendment's Equal Protection Clause, because they failed to present that claim in the courts below. Second, aside from being waived, petitioners' equal protection arguments present no issue worth this Court's review. Third, the other theory offered by petitioners – that the nonresident surcharge violates the "public trust doctrine" – presents no federal question, but is an issue of Illinois law.

### A. Petitioners Have Waived Their Federal Equal Protection Argument

In the Appellate Court and Supreme Court of Illinois, petitioners carefully avoided relying on the Fourteenth Amendment's Equal Protection Clause. Instead, they limited their equal protection argument to the Illinois Constitution's equal protection guarantee. This decision was a deliberate gamble. Petitioners hoped that the Illinois Supreme Court would avoid relying on the federal Constitution and would instead strike down the surcharge under the Illinois Constitution. Such a result, resting solely on a State constitutional guarantee, could have insulated petitioners from further review by this Court. See *Michigan v. Long,* 463 U.S. 1032, 1040-1041 (1983).

However, petitioners' gamble failed. They lost in the Illinois Supreme Court. They now want this Court to review the *federal* equal protection claim that for tactical reasons they suppressed below.

Such a tactic is impermissible. To have this Court review their federal equal protection claim, petitioners must have "adequately presented" that claim in the State courts. *Webb v. Webb,* 451 U.S. 493, 496-497 (1983). Petitioners did not present, much less "adequately present," their federal equal protection claim in the Illinois courts. To the contrary, in the Illinois Appellate and Supreme Courts, they suppressed that claim. They thereby waived their right to present the federal claim to this Court. See *Bankers Life & Cas. Co. v. Crenshaw,* ___ U.S. ___, 108 S.Ct. 1645, 1650 (1988): "At the minimum, there should be no doubt from the record that a claim under a federal statute or the *federal* Constitution was presented in the State courts . . ." (emphasis in original).

Any other holding would place litigants in a posture of "heads I win, tails you lose." Litigants like petitioners could bring equal protection challenges based solely on State constitutional guarantees, knowing that if they win, they could prevent review by this Court, but that if they lose, they could switch to an analogous federal theory and get review by this Court.

In rejecting petitioners' Illinois equal protection claim, the Illinois Supreme Court stated that the nonresident surcharge also passed muster under the federal Equal Protection Clause as well. Petition, 11a. This comment is a pure example of a *dictum:* a statement seeming to decide a claim that petitioners had deliberately refrained from asking the court to decide. Such a *dictum* does not change the fact that petitioners deliberately avoided relying on the federal Equal Protection Clause in the courts below. That conduct waived their right to obtain review under the Clause in this Court. That waiver is not excused by the Illinois Supreme Court's reference to the federal Clause in its decision.

### B. Petitioners' New Federal Equal Protection Claim Has No Merit in Any Case

Petitioners' claim under the federal Equal Protection Clause would have no merit even if it had been preserved for review.

Classifications based on residency pass equal protection muster if they have any rational basis. *Martinez v. Bynum*, 461 U.S. 321, 325-326 (1983); *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371, 379 (1979). As the Illinois Supreme Court held, the surcharge is supported by an eminently rational basis.

First, the surcharge rationally helps the District promote its own residents' access to scarce harbor moorings. This Court has repeatedly held that when a governmental jurisdiction constructs facilities for public use, it has a rational basis under the Equal Protection Clause for favoring its own residents' use of those facilities. *Vlandis v. Kline*, 412 U.S. 441, 452-453 (1973); *Martinez v. Bynum*, 461 U.S. 321, 328 (1983). On similar grounds, in *Baldwin v. Fish & Game Commission of Montana, supra*, this Court held that the state of Montana had a rational basis for preserving its own citizens' access to the finite supply of elk in the State. 436 U.S. at 388-390. This Court therefore rejected an Equal Protection Clause attack on Montana's huge nonresident surcharge on hunting licenses for elk.

*Vlandis*, *Martinez*, and *Baldwin* demolish plaintiffs' equal protection claim. As the Illinois Supreme Court noted, the District's harbor moorings are a finite resource. Just as a school district may constitutionally favor its own children's access to limited school facilities (*Martinez*), and just as Montana may constitutionally use fee distinctions to preserve the state's finite game supply for the benefit of its own residents (*Baldwin*), the Chicago Park District may constitutionally impose a modest surcharge on nonresidents as an allocation device to preserve its own residents' access to the finite supply of harbor moorings.

Second, the nonresident surcharge is a rational method of compensating for nonresidents' lesser contribution to the physical and administrative infrastructure that makes the harbors possible. This Court has repeatedly affirmed lower courts who

upheld, using this rationale, the constitutionality of nonresident surcharges. See *Starns v. Malkerson*, 401 U.S. 985 (1971), *summarily affirming* 326 F.Supp. 234 (D.Minn. 1970) (three-judge court); *Sturgis v. Washington*, 414 U.S. 1057 (1970), *summarily affirming* 368 F.Supp. 38 (N.D. Wash. 1973) (three-judge court). In *Baldwin, supra*, this Court noted that Montana's 2,500% nonresident surcharge for elk hunting licenses could be justified, among other reasons, on this ground. This Court wrote that only Montana residents contributed, with their taxes, to the infrastructure that made elk hunting possible. 436 U.S. at 389.

As the Illinois Supreme Court held, this rationale justifies the nonresident surcharge. The Chicago Park District's harbors are embedded in, and depend on, a magnificent park system that Chicago residents support with their taxes and nonresidents do not. Moreover, the taxes paid by Chicago's residents support not only this physical infrastructure, but also an expensive administrative infrastructure. The harbors demand continuous attention from the District's top management, its financial officers, its Department of Personnel, its Law Department, its construction tradesmen, its security department, and more. The nonresident surcharge rationally helps compensate for the fact that Chicago residents' taxes support this infrastructure.

Petitioners' arguments against these rational bases for the mooring surcharge have no merit. First, petitioners claim that this Court has held that "a state cannot discriminate between its citizens based soley [*sic*] on past payment of real estate taxes." Petition at 12, citing *Shapiro v. Thompson*, 394 U.S. 618 (1968). *Shapiro* holds no such thing. It involved a challenge not to a *bona fide* residency requirement, but to a *durational* residency requirement for receiving welfare benefits. *Bona fide* residency requirements base distinctions on where people live; durational residency requirements base distinctions on how long people have lived where they do. Unlike *bona fide* residency requirements, durational residency requirements sometimes implicate the right to travel, as the requirement did in *Shapiro*. They therefore can be subjected to a higher standard of scrutiny under the Equal Protection Clause. *Martinez v. Bynum, supra*, 461 U.S. at 325-326, 328 n.7. Using this heightened standard, *Shapiro* declined to sustain a durational residency requirement for welfare on the

ground that the plaintiffs had not paid past taxes in the jurisdiction affording the benefits.

But as to *bona fide* residency requirements, things are different. This Court routinely upholds *bona fide* residency requirements on the rationale that residents pay more to support local facilities and services than nonresidents pay. See *Martinez v. Bynum, supra,* 461 U.S. at 325-329, which refused to apply the holding of *Shapiro v. Thompson* to a *bona fide* residency requirement that charged tuition to nonresident schoolchildren but not to resident schoolchildren.

Second, petitioners claim that a municipality may not constitutionally favor its own residents' use of "public property" over nonresidents'. Petition at 14. No citation is given for this assertion; none exists. *Martinez* and other cases hold precisely the opposite. See, e.g., *County Board of Arlington, Va. v. Richards,* 434 U.S. 5, 7 (1977), which upheld a municipal ordinance that denied nonresidents the right to park on certain streets.

Third, even though this Court's decisions recognize the District's interest in promoting its own citizens' access to scarce facilities, petitioners claim that "rather than being scarce and limited facilities, the moorings are an expanding asset." Petition at 15. Petitioners ask this Court to take "judicial notice" of a flyer in which the District discusses a plan to increase the number of moorings. Petitioners airily claim that there are "unused miles and miles" of Lake Michigan shoreline where new harbors could be built.

It is hard to imagine a poorer argument. While the District may build more moorings in the future, those moorings will continue to be limited-capacity facilities whose supply is exceeded by the demand for them. Indeed, it is the heavy demand for these scarce moorings that may induce the District to undertake the huge investment needed to build new harbors. The record in this case shows that demand for these moorings has substantially exceeded the supply, resulting in waiting lists. Petition at 37a. Nothing in the record suggests that this will not continue to be true. So long as it is, the District may legitimately take steps to keep its own citizens from being crowded out of the harbors by nonresident boaters. The allocation measure it has

thus far chosen — a modest price break to Chicago residents — is a highly rational means of carrying out this permissible government objective.

Fourth, petitioners try to distinguish *Baldwin* by arguing that its rationale is applicable only to discrimination by States against citizens of another State. Petition at 16. Nothing in *Baldwin* supports this reading. Petitioners confuse *Baldwin's* discussion of the Equal Protection Clause with its entirely separate discussion of the Privileges and Immunities Clause. The Court's discussion of the Privileges and Immunities Clause necessarily focused on State discrimination against citizens of other States, since that is the only kind of discrimination that the Clause deals with. But in discussing the validity of Montana's nonresident surcharge under the Equal Protection Clause, this Court upheld the surcharge for reasons that are applicable to residency requirements imposed by any level of government, whether federal, state, or local. 436 U.S. at 389. And other decisions of this Court have applied the equal protection principles discussed in *Baldwin* to residency discrimination by municipalities. See *Martinez v. Bynum, supra.*

Fifth, petitioners suggest that upholding the District's nonresident surcharge will invite municipalities to use such surcharges to discriminate on the basis of race. Petition at 18. The answer to this argument is that petitioners have never alleged that the Chicago Park District imposes its nonresident mooring surcharge for that purpose.

Sixth, petitioners say that an Illinois constitutional provision known as the "Uniform Fees" clause requires this Court to treat residency as a "suspect" classification, and therefore requires the nonresident surcharge to be subjected to "strict scrutiny" under the federal Equal Protection Clause. Petition at 17, 20-21. No authority or logic supports this attempt to have the Illinois tail wag the federal dog. Federal law, not State law, dictates which classifications are "suspect" under the Fourteenth Amendment. As discussed above, *bona fide* residency is not a "suspect" criterion under the Equal Protection Clause. It implicates no "fundamental right" and receives only the usual "rational-basis" review under the Clause. As the Illinois Supreme

Court rightly held, the District's nonresident surcharge easily passes that review.

### C. Petitioners' "Public Trust Doctrine" Argument Presents No Federal Claim

The Illinois Supreme Court rejected petitioners' argument that the nonresident surcharge violates Illinois' "public trust doctrine." Petitioners seek this Court's review of that holding, claiming that it "conflicts" with holdings by courts in other States. Petition at 18-19. However, the holding is purely one of Illinois law, so that this Court has no appellate jurisdiction to review it.

The "public trust doctrine" originated in the common law. Under English common law, title to lands under navigable or tidal waters was held by the King in trust for public use. In America, title to such lands passed after independence to the United States, subject to the same public trust. This Court held early on that when States were admitted to statehood, they acquired title to these "public trust lands," subject to a paramount "navigational servitude" in favor of the United States to insure that they remain available for navigation. See *Phillips Petroleum Co. v. Mississippi*, ___ U.S. ___, 108 S.Ct. 791, 796 (1988); *Oregon v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 375-376 (1977).

Once a State has acquired title to public trust lands, federal law in general ceases to govern the use of those lands. In *Oregon v. Corvallis Sand & Gravel Co., supra*, this Court held that issues of ownership of a State's public trust lands are governed by the law of the State, not by federal common law. And this Court has long made it clear that "the individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit." See *Phillips Petroleum Co. v. Mississippi, supra*, 108 S.Ct. at 794.

Federal law impinges on State-owned public trust lands in only two limited particulars. First, such lands remain subject to a "navigational servitude" in favor of the United States. See *Gibson v. United States*, 166 U.S. 269, 271-272 (1897). Second, in land title disputes between States and private citizens, it is sometimes necessary to determine whether certain lands were

in fact public trust lands owned by the United States at the time Congress passed the statehood act admitting the State in question. If they were, then the State acquired title to them through the federal statehood act, and the private claimants lose. *See, e.g., Phillips Petroleum Co. v. Mississippi, supra.*

Neither of these federal issues, of course, is involved in this lawsuit. No one claims that the Chicago Park District's price structure for the seasonal rental of boat moorings interferes with the paramount right of the United States to assure the continued navigability of Lake Michigan. And this case raises no issue of whether title to the lands underlying the District's harbors did or did not pass to Illinois by virtue of the federal act admitting Illinois to statehood. Accordingly, while the lands underlying the District's harbors are "public trust lands," no federal issue is raised by their status as such.

In invoking the "public trust doctrine," petitioners mistake a state-law doctrine for a federal one. Over the years, a number of State courts have had occasion to decide what uses of public trust lands owned by the State in question (or a municipality of that State) serve the "public trust." See, e.g., *People ex rel. Scott v. Chicago Park District,* 66 Ill.2d 65, 360 N.E.2d 773 (1976); *Borough of Neptune City v. Borough of Avon-By-The-Sea,* 294 A.2d 47, 61 N.E.2d 296 (1972). Such decisions have been decided under the law of the particular State in question. These courts have not claimed to be interpreting federal law. They have not claimed to be enforcing a federal standard of what the "public trust" is. Rather, they are defining State-law standards for the use of lands that are owned by the State in question or its political subdivisions.

For this reason, the "conflict" claimed by petitioners between different States' "public trust doctrine" decisions does not involve federal law, and in fact is not a conflict. Instead, these decisions reflect variations in different States' views of what uses of land serve the public trust as each of those States defines that concept. For example, New Jersey thinks that the public trust requires beach fees to be equal for everyone (see *Neptune City, supra*). Illinois thinks that the public trust allows reasonable municipal price distinctions based on residency (see the decision below). Our federal system is designed to allow (and encourage) such

varying views among States. Neither view implicates federal law, much less conflicts with any federal definition of the "public trust."

Petitioners failed to persuade the Illinois Supreme Court that the public trust, as defined by Illinois law, forbids the District's administrative pricing distinction between residents and non-residents of Chicago. This Court has no appellate jurisdiction to review that state-law decision.[1]

## CONCLUSION

The District respectfully requests that the petition for certiorari be denied.

Respectfully submitted,

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[1] One further argument in the petition deserves only a footnote. Petitioners assert that the Illinois Supreme Court deprived them of federal due process by failing to hold that the nonresident surcharge violates a provision of the Illinois Constitution requiring uniform fees and taxes. Petition at 22-23. This argument unmistakably says that because petitioners lost one of their State constitutional claims, they have been denied federal due process. Not so.

## POINTS AND AUTHORITIES

*Page*

BRIEF AND ARGUMENT FOR PLAINTIFF-APPELLANTS

1. NATURE OF THE ACTION ..... 1

2. ISSUES PRESENTED FOR REVIEW ..... 2

3. JURISDICTION ..... 3

Illinois Supreme Court Rule 302(a) ..... 3
Illinois Supreme Court Rule 315(a) ..... 3

4. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED ..... 4

5. STATEMENT OF FACTS ..... 7

ARGUMENT

I. THE APPELLATE COURT WAS WITHOUT JURISDICTION TO HEAR THE APPEAL OF THE CHICAGO PARK DISTRICT ON THE LOWER COURT'S RULING THAT THE NON-RESIDENT SURCHARGE IS UNCONSTITUTIONAL ..... 9

*Lombard v. Elmore,*
112 Ill.2d 467. 493 N.E.2d 1063,
98 Ill.Dec. 42, 44 (1986) ..... 11

Illinois Supreme Court
Rule 302(a) ..... 9, 11
Rule 303(e) ..... 9, 10
Rule 308 ..... 9

Ill. Rev. Stat., Chap. 105, Sec. 333.23n(g) ..... 9

II. THE COURT ERRED IN HOLDING THAT THE CHICAGO PARK DISTRICT MAY DISCRIMINATE AGAINST NON-RESIDENTS OF THE DISTRICT BY CHARGING THEM A SURCHARGE. ..... 12

*Page*

*People ex. rel Scott v. Chicago Park District,*
66 Ill.2d 65, 360 N.E.2d 773, 4 Ill.Dec. 660 (1977) ..... 23

*Village of Braceville v. Doherty,*
30 Ill.App. 645 (1889) ..... 23

*W.C.M. Window Co., Inc. v. E. Allen Bernardi,*
730 F.2d 486 (7th Cir. 1984) ..... 24

Ill. Rev. Stat., Chap. 48, para. 39s - 1 et seq. ..... 24

E. The State Statute Which Authorizes That Fees Charged To Nonresidents Need Not Be The Same As Residents Must Be Interpreted to Mean That The Fees May Be Larger Only If Additional Burdens Are Imposed On The Park As A Result of Nonresident Usage. ..... 25

*Douglas v. Village of Melrose Park,*
389 Ill. 98, 101, 58 N.E.2d 864, 865 (1945) ..... 25

*Williams v. City of Chicago,*
66 Ill.2d 423, 362 N.E.2d 1030 (1977) ..... 26

Illinois Revised Statutes
Chapter 105, Section 8-1(h) ..... 27
Chapter 105, Section 333.23n(g) ..... 25

Chicago Park District Code
Section 8-1 ..... 26
Section 333.23n(g) ..... 24

F. The Park District's Own Ordinances Prohibit Discrimination: Fees Must Be Uniform ..... 27

Chicago Park District Code
Section 30-8 ..... 28

G. The Same Panel Of The Appellate Court Has Issued An Opinion Exactly Opposite To Its Opinion In This Case ..... 28

*Page*

*Bobrowicz v. City of Chicago,*
168 Ill.App.3d 227, 522 N.E. 2d 663, 669,
119 Ill.Dec. 1, 7 (1988) ..... 28

III. THE COURT ERRED IN HOLDING THAT THE CHICAGO PARK DISTRICT CAN MAKE A PROFIT ON ITS NON-BONDED FACILITIES. ..... 29

*Ward Baking Co. v. City of Chicago,*
340 Ill. 212, 214, 172 N.E. 171 (1930) ..... 29

Ill. Rev. Stat., Chap. 105, Sec. 333.23 (p) ..... 29

A. The Chicago Park District, A Unit Of Local Government, Has No Implied Powers, to "Rent" Its Moorings At A Profit, Or Otherwise Under The Illinois Constitution of 1970. ..... 30

Illinois Constitution
Article VII, Section 1 ..... 31
Article VII, Section 8 ..... 30

Illinois Revised Statutes
Chapter 105, Section 223.23(p) ..... 31
Chapter 105, Section 333.19 ..... 31

B. The Chicago Park District Exercises A Governmental Or Police Power When It Licenses Non-Bonded Moorings For Revenue By Making A Profit - It Does Not Have A Proprietary Power To "Rent" Moorings. ..... 32

*Bauer v. City of Chicago,*
321 Ill. 259 ..... 36

*City of Bloomington v. Ramey,*
393 Ill. 467, 66 N.E. 2d 385 (1946) ..... 37

*City of Carrollton v. Bagette,*
159 Ill. 284, 42 N.E. 837 (1986) ..... 38

*Page*

A. Residency-Based Discrimination Is Not Permissible Under The United States Constitution Unless It Is Reasonably Related To Some Additional Burdens Imposed By The Non-Residents ..... 12

*Baldwin v. Fish and Game Commission of Montana,*
436 U.S. 371 (1979) ..... *passim*

B. The Court's Opinion Is Contrary To The Equal Protection And Uniform Fees Clauses Of The Illinois Constitution. ..... 16

*Anderson V. Wagner,*
61 Ill.App.3d 822, 378 N.E.2d 805, 809 (4th Dist. 1978), *affirmed* 79 Ill.2d 295, 402 N.E.2d 558 (1980) ..... 16

*Baldwin v. Fish and Game Commission of Montana,*
436 U.S. 371 (1979) ..... 17

*Corfield v. Coryell,*
6 F. Cas. 546, 551-52 (No. 3, 230) (CCED Pa. 1825) ..... 17

*People ex. rel. Scott v. Chicago Park District,*
66 Ill.2d 65, 360 N.E.2d 773 (1977) ..... 17

*Searle Pharmaceuticals, Inc. v. Department of Revenue,*
117 Ill.2d 4544, 512 N.E.2d 1240 (1987) ..... 17, 18

Illinois Constitution
Article I, Section 2
Article IX, Section 2 ..... *passum*

C. The Appellate Court's Opinion Is Contrary To The Illinois Public Trust Doctrine. ..... 19

*Basker v. West Chicago Park Commissioners,*
66 Ill.App. 507, 510 (1896) ..... 21

*Borough of Neptune City v. Borough of Avon-By-The-Sea,*
61 N.J. 296, 294 A.2d 47 (1972) ..... 19

*Page*

*Lincoln Park Traps v. Chicago Park District,*
323 Ill.App. 107, 114, 55 N.E. 2d 123 (1944) ..... 21

*Love v. Glencoe Park District,*
270 Ill.App. 117, 120 (1933) ..... 21

*People ex. rel. Scott v. Chicago Park District,*
66 Ill.2d 65, 360 N.E.2d 773, 4 Ill.Dec. 660 (1977) ..... 19

*Quinn v. Irving Park District,*
207 Ill.App. 449, 457 (1971) ..... 21

10 McQuillin on Municipal Corporations
Section 28.52 ..... 20

10 I.L.P. *Cities, Villages, and Other Municipal Corporations*
Section 1761 ..... 21

D. The Opinion Of The Appellate Court Is Contrary To 92 Years of Illinois Case Law Prohibiting Discrimination Based On Residency ..... 22

*American Baking Co. v. City of Wilmington,*
370 Ill. 400, 19 N.E.2d 172 (1938) ..... 23

*Borough of Neptune City v. Borough of Avon-By-The Sea,*
61 N.J. 296, 294 A.2d 47, 57 A.L.R. 3d 983 (1972) ..... 23

*City of Carrollton v. Bazzette,*
159 Ill. 284 (1896) ..... 23

*City of Elgin v. Winchester,*
300 Ill. 214, 133 N.E. 205 (1921) ..... 22

*Larson v. City of Rockford,*
371 Ill. 441, 21 N.E. 2d 396 (1939) ..... 23

*Lucas v. City of Macomb,*
49 Ill.App. 60 (1892) ..... 23

*People ex. rel Bernardi v. Leary Construction Company,*
102 Ill.2d 295, 464 N.E.2d 109, 80 Ill.Dec. 36 (1984) ..... 24

*Page*

*City of Chicago Heights v. Public Service Company,*
408 Ill. 604, 97 N.E.2d 807 (1951) ..... 40

*City of Chicago Heights v. Western Union Telegraph Co.,*
406 Ill. 428, 94 N.E.2d 306 (1950) ..... 40

*City of Peoria v. Gugenheim,*
61 Ill.App. 374 (1895) ..... 39

*City of Peoria v. Postal Telegraph Cable Co.,*
274 Ill. 568, 113 N.E. 968 (1916) ..... 39

*Condon v. Village of Forest Park,*
278 Ill. 218, 115 N.E. 825 (1917) ..... 41

*Great Plains Resources, Inc. v. Benton,*
127 Ill.App.3d 971, 974 (1984) ..... 34

*Herb Bros. v. City of Chicago,*
264 Ill. 628, 106 N.E. 434 (1914) ..... 38

*Lamere v. City of Chicago,*
391 Ill. 536, 561 (1945) ..... 34, 37

*McNeil v. Chicago Park District,*
401 Ill. 556 (1948) ..... 32

*Nature's Rival Co. v. City of Chicago,*
324 Ill. 566 ..... 36

*Quad Canteen Service Corp. v. Ruzak,*
85 Ill.App.3d 256. 40 Ill.Dec. 610 (1980) ..... 40

*Rozner v. Korshak,*
55 Ill.2d 430, 303 N.E.2d 389, 390 (1973) ..... 34

*Ward Baking Co. v. City of Chicago,*
340 Ill. 212, 172 N.E. 171 (1930) ..... 35

*Wiggins v. City of Chicago,*
68 Ill. 372 (1873) ..... 38

Illinois Constitution of 1970
Article VII, Section 1 ..... 33
Article VII, Section 6(e) ..... 34

*Page*

Illinois Revised Statutes
Chapter 105, Section 332.23(p) ..... 34, 41

Chicago Park District Code
Section 30-3.1(j) ..... 33

10 McQuillin on Municipal Corporations
Section 526.32c ..... 39

C. This Court Has Rejected The "Implied Rental" Theory Relied Upon By The Appellate Court In Its Decisions Since 1950 ..... 42

*City of Chicago Hts. v. Western Union,*
406 Ill. 428, 433 (1950) ..... 42, 43

*Village of Lombard v. Illinois Bell Telephone Co.,*
405 Ill. 209 (1950) ..... 42

Illinois Revised Statutes
Chapter 105, Section 333.23n(g) ..... 44

D. The Court's Reliance On A Supposed "Statutory Scheme" Is Erroneous Because The Cited Statutes Relate Only To Bonded Facilities, While This Case Deals Only WithNon-Bonded Moorings. ..... 44

Illinois Revised Statutes
Chapter 105, Section 333.23o ..... 46
Chapter 105, Section 333.23p ..... 46
Chapter 105, Section 333.23q ..... 46
Chapter 105, Section 333.23r ..... 44, 46
Chapter 105, Section 333.23r(1) ..... 44
Chapter 105, Section 333.23s ..... 45, 46
Chapter 105, Section 333.23t ..... 46
Chapter 105, Section 333.23u ..... 47

E. The Appellate Court Effectively Overruled This Court's Prior Decisions That Fees Charged By Units Of Local Government Are Subject To Judicial Review When It Refused To Review The 500% Profit Charged By The Park District. ..... 50

*Page*

*Condon v. Village of Forest Park,*
278 Ill. 218 (1917) ..... 52

*McNeil v. Chicago Park District,*
401 Ill. 556 (1948) ..... 50, 51

F. The "Implied Rental" Authority Found By The Appellate Court Is Contrary To The Evidence Produced In The Trial Court. ..... 53

*McNeil v. Chicago Park District,*
401 Ill. 556 (1948)

Illinois Revised Statutes
Chapter 105, Section 333.23n ..... 53

Chicago Park District Code
Section 30-3 ..... 54

Black's Law Dictionary 1298 (4th ed. 1968) ..... 53, 54

G. No Ordinance Of The Park District Allows Profits To Be Made On Mooring Fees Or Permits An Unreasonable Fee ..... 56

Chicago Park District Code
Section 30-8 ..... 56

H. The Decisions Of The United States Supreme Court Are Uniform That Fees Must Approximate Costs, Contrary To The Holding Of The Appellate Court. ..... 56

*American Airlines v. Massachusetts Port Authority,*
650 F.2d 1036 (1st Cir., 1977) ..... 56

*Evansville-Vanderburgh Airport Authority District v. Delta Airlines,* 405 U.S. 707, 92 S.Ct. 1349, 31 L.Ed. 2d 620 (1972) ..... 56

CONCLUSION ..... 57

PRAYER FOR RELIEF ..... 58

II.

## THE COURT ERRED IN HOLDING THAT THE CHICAGO PARK DISTRICT MAY DISCRIMINATE AGAINST NON-RESIDENTS OF THE DISTRICT BY CHARGING THEM A SURCHARGE

Discrimination by an Illinois Park District against certain citizens of the State of Illinois who are nonresidents of the Park District, contrary to the opinion of the appellate court, is illegal and void under the United States and Illinois Constitutions and under the "Public Trust Doctrine" fashioned by this Court and the appellate courts governing the use of parks in Illinois. The appellate court in its opinion addressed only the federal constitutional aspects of the Plaintiffs' arguments as to the invalidity of the non-resident surcharge imposed by the Chicago Park District. The appellate court erred in its analysis under the United States Constitution but, more disturbingly, the appellate court failed to even address Plaintiffs' arguments under the Illinois Constitution and the case law establishing the Public Trust Doctrine, under which the surcharge was found to be void, illegal, and unconstitutional by the trial court.

### A. Residency-Based Discrimination Is Not Permissible Under The United States Constitution Unless It Is Reasonably Related To Some Additional Burdens Imposed By The Non-Residents.

The appellate court based its entire opinion for overturning the trial court's order regarding the non-resident surcharge on *Baldwin v. Fish and Game Commission of Montana*, 436 U.S. 371 (1979). The *Baldwin* case upheld a Montana hunting license system, which charged non-residents of the state a substanitally higher fee than residents for a license to hunt elk and other game. The *Baldwin* Court discussed at length the relationship between citizens of different states. In discussing the Privileges and Immunities clause, the Court pointed out that its only concern in that decision was with the relationship of residents of one state to another state. *See* 436 U.S. at 380-82. The appellate court's faith in the power of this case is misplaced. The trial court's succinct and accurate summation of its irrelevency was as follows:

> "THE COURT: I don't have any trouble with *Baldwin*. *Baldwin* dealt with non-residents of a state as opposed to residents of a state. The class of people that we are dealing with are all residents and taxpayers of the same state." (R.373, p. 19)

It is obvious from *Baldwin* that the Court there was dealing with the relationship of Citizens of one state with another state. This is not issue in this case. The issue here is whether the Chicago Park District can charge an Illinois citizen who is a resident of, e.g., Wilmette or Evanston, an extra fee for use of its harbor. *Baldwin* is therefore totally irrelevant to a determination of this issue. Even the *Baldwin* Court recognized that the case did not apply to discrimination among residents of the same state when it stated as follows:

> "It appears to have been generally accepted that although the States were obligated to treat all those within their territory equally in most respects, they were not obligated to share those things they held in trust for their own people." 436 U.S. at 384.

Thus, the Court acknowledges that a higher level of scrutiny would attach to discrimination based on residency *within* a state. The U.S. Supreme Court, in a case decided six years later, held that discrimination based upon municipal residency is subject to the "substantial reason" test of the Privileges and Immunities Clause. *United Building and Construction Trades Council of Camden County and Vicinity v. City of Camden*, 465 U.S. 208, 79 L.Ed. 249, 104 S.Ct. 1020 (1984).

Even under the standards of *Baldwin*, however, the non-resident surcharge in the present case must fall. The Supreme Court applied the standard "additional burdens imposed" analysis used in privileges and immunities cases in *Baldwin*. Under the facts of that case, the Court held that the nonresidents' use of Montana hunting facilities *did* create additional burdens on the State of Montana (436 U.S. at 390) which justified a higher fee to be imposed on nonresidents. In the case at bar, there are absolutely no additional burdens imposed on the Chicago Park District in providing moorings to nonresidents, which the appellate court acknowledged. (Op. p. 4).

Furthermore, *Baldwin* does *not* deal with property "held in trust for the equal benefit of all the people" that must *not* be operated "in such a manner that a preferential use thereof is granted to any one person or to any group of persons." *Lincoln Park Traps v. Chicago Park District*, 323 Ill. App. 107, 114, 55 N.E.2d 123 (1944). Finally, the *Baldwin* Court was not confronted with a state constitution which prohibits non-uniform fees. (Illinois Constitution, Art. IX, sec. 2). In fact, as illustrated by the *Baldwin* majority in the quote above, and as clearly expressed by the dissent, a fundamental right long recognized of every citizen is to be treated equally as every other citizen of his or her state by that state in regards to "taxes and impositions." 436 U.S. at 395, 56 L. Ed. at 373 (Brennan, J., dissenting), *quoting* Mr. Justice Washington in *Corfield v. Coryell*, 6 F. Cas. 546, 551-52 (No. 3,230) (CCED Pa. 1825).

Of even greater import is the decision by the U.S. Supreme Court that holds the Privileges and Immunities Clause applies to laws that discriminate among state residents on the basis of municipal residencey. In *United Building and Construction Trades Council of Camden County and Vicinity v. Mayor and Council of the City of Camden*, 465 U.S. 208, 79 L.Ed.2d 249, 104 S. Ct. 1020 (1984), at issue was the ordinance of Camden, New Jersey, which required that 40% of the employees of contractors working on city projects be Camden residents. The Court specifically addressed the question of whether the Privileges and Immunities Clause of the United States Constitution applied to a municipal ordinance. In holding that it did, the Court said at 79 L.Ed. 256:

> "(A) municipality is merely a political subdivision of the State from which its authority derives. (Citation) It is as true of the Privileges and Immunities Clause of the Equal Protection Clause that what would be unconstitutional if done directly by the State can no more readily be accomplished by a city deriving its authority from the State."

The Court further held that discrimination based on *municipal* residency was equally bad as that based on state residency and that both came under the Privileges and Immunities Clause. The Court said at 79 L.Ed. 257:

> "We have never read the Clause so literally as to apply it only to distinctions based on state citizenship. For example, in *Mullaney v. Anderson*, 342 U.S. 415, 410-420, 96 L.Ed. 458, 72 S. Ct. 428 (1952), the Court held that the Alaska Territory had no more freedom to discrimnate against those not resident in the Territory than did any State to favor its own citizens . . . A person who is not residing in a given State is ipso facto not residing in a city within that State. Thus, whether the exercise of a privilege is conditioned on state residency or on municipal residency he will just as surely be excluded."

The appellate court's holding is without basis in the law and the facts of the case. It sets a dangerous precedent. Can it be seriously doubted that Park Districts throughout the Chicago metropolitan area and the entire State seeking ways to invidiously discriminate against their neighbors welcome the appellate court's opinion with open arms, and cannot hesitate to draw this sword from their sheath? The potential for abuse is enormous.

### B. The Court's Opinion Is Contrary To The Equal Protection and Uniform Fees Clauses of The Illinois Constitution.

Article I, Section 2 of the Illinois Constitution of 1970 (the Illlinois Equal Protection Clause") provides as follows:

> "No person shall be deprived by life, liberty or property without due process of law **nor be denied the equal protection of the laws.**" (Emphasis added.)

It is undisputed that no additional burden has been imposed by non-residents on the Park District, thus raising serious questions under the Illinois Constitution of 1970 as to the unequal treatment of non-residents. Significant by its absence is any mention of the Illinois Constitution in the appellate court's opinion, even though the statute at issue was found unconstitutional under it. Not one word is used to attempt to show how a subdivision of the State (the Park District) can discriminate against state citizens based upon their residence when the State itself cannot do so under the Illinois Constitution. The appellate

court did not even discuss the residency issue even though it raises a stricter level of scrutiny. As the court stated in *Anderson v. Wagner*, 61 Ill. App. 3d 822, 378 N.E.2d 805, 809 (4th Dist. 1978), *affirmed* 79 Ill.2d 295, 402 N.E.2d 558 (1980), in discussing the tests to be applied in Equal Protection analysis:

> "The yardstick for measuring equal protection arguments has a number of sides. The traditional test for equal protection is not whether a statute results in unequal treatment, but whether the statutory inequality of treatment has a reasonable basis in fact. (*McGowan v. Maryland* (1961), 366 U.S. 420, 425-26.) A more exacting test known as the strict scrutiny test is employed in cases concerning 'suspect classifications' (*e.g.*, race, sex ethnic background, residency, and alienage) or 'fundamental interests' (*e.g.*, the right to travel freely or to practice a religion)." (Emphasis added.)

Here, where residency-based disrimination exists in an area well known for communities highly-segregated by both race and economic wealth, heightened scrutiny is called for. Furthermore, under Illinois law, the privilege of Illinois citizens to share equally the recreational resources of the state is a "fundamental" interest demanding more than cursory review. *See People ex rel. Scott v. Chicago Park District*, 66 Ill.2d 65, 360 N.E.2d 773 (1977). *See also, Baldwin*, 436 U.S. at 395, 56 L. Ed. at 373 (Brennan, J., dissenting), *quoting* Mr. Justice Washington in *Corfield v. Coryell*, 6 F. Cas. 546, 551-52 (N. 3,230) (CCED Pa. 1825).

In addition, Article IX, Section 2 of the Illinois Constitution of 1970 (the "Uniformity Clause" or "Uniform Fees Clause") provides as follows:

> "In any law classifying the subjects or objects of non-property taxes *or fees*, the classes shall be reasonable and the subjects and objects within each class shall be taxed *uniformly*." (Emphasis added)

The Uniformity Clause of Article IX, Section 2, where applicable, attaches a stricter standard of review than the Illinois Equal Protection Clause. *Searle Pharmaceuticals, Inc. v.*

*Department of Revenue*, 117 Ill.2d 454, 512 N.E.2d 1240 (1987). The appellate court should have applied the stricter standard of the Uniformity Clause to the Park District's practice of discriminating against non-residents, but failed to even consider the provision. The Park District charged a fee 25% greater to nonresidents that to residents, while admitting that there are no additional costs for supplying moorings to nonresidents than to residents. The Park District's actions thus violate Article IX, Section 2 of the Illinois Constitution, which provides further support for affirming the trial court's ruling on the surcharge and reversing the appellate court.

This Court, in *Searle Pharmaceuticals, Inc. v. Department of Revenue*, 117 Ill.2d 454, 512 N.E.2d 1240 (1987), explained in detail the Uniformity Clause's limitations on non-property taxes and fees. In *Searle*, this Court, after reviewing the history behind Article IX, Section 2 (117 Ill.2d at 468-69, 512 N.E.2d at 1245-46), held that "a broader limitation on the legislative power to classify for non-property purposes was intended to be included in the language of section 2 than the limitation of the equal protection clause." 117 Ill.2d at 469, 512 N.E.2d at 1246.

The non-resident surcharge cannot withstand scrutiny under even the rational basis test under the Equal Protection Clause employed by the appellate court, for the basis found by the court to support the discrimination is fallacious and illusory. The appellate court's basis was given as follows:

> "[W]here a local public entity has recreational resources which are finite, it has a justifiable interest in favoring the utilization of those resources by its residents over nonresidents." (Opinion p. 8.)

No authority is given by the appellate court for its above conclusion. Certainly there is none which will support it. The stated reason is fallacious, because it permits discrimination in *every* instance - since *all* recreational facilities and resources can be considered finite. It is illusory also because it ignores the strong public policy of this State, embodied in the Public Trust Doctrine, of preserving the natural resources of this State not just for a segment of its citizenry, but for all citizens equally.

Under any constitutional test the Park District residency discrimination fails to pass muster.

### C. The Appellate Court's Opinion Is Contrary To The Illinois Public Trust Doctrine.

This Court, in *People ex rel. Scott v. Chicago Park District*, 66 Ill.2d 65, 360 N.E.2d 773, 4 Ill.Dec. 660 (1977), discussed the history of the "Public Trust Doctrine" when it invalidated an enactment of the legislature based upon that doctrine. This Court cited as authority *Borough of Neptune City v. Borough of Avon-By-The-Sea*, 61 N.J. 296, 294 A.2d 47 (1972) (which invalidated a beach fee where non-residents of a municipality were charged a higher fee than residents, although all users were citizens of the same state), when it stated that the use of "Lake Michigan is a valuable natural resource belonging to the people of this State in perpetuity," and that the use of said resource by the government "has to withstand a most critical examination." 66 Ill.2d at 79, 360 N.E.2d at 781. In *Scott*, this Court states as follows:

> " 'When a state holds a resource which is available for the free use of the general public, a court will look with considerable skepticism upon any governmental conduct which is calculated either to reallocate that resource to more restricted uses or to subject public uses to the self-interest of private parties.' [Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich.L.Rev. 471, 490 (1970).] And it may be pointed out that, in considering what is the public interest, courts are not bound by inflexible standards.
>
> 'We have no difficulty in finding that, in this latter half of the twentieth century, the public rights in tidal lands are not limited to the ancient prerogatives of navigation and fishing, but extend as well to recreational uses, including bathing, swimming and other shore activities. The public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was

> created to benefit.' *Borough of Neptune City v. Borough of Avon-By-The-Sea* (1972); 61 N.J. 296, 309, 294 A.2d 47, 54-55, and cases and authorities cited therein; see also *Marks v. Whitney* (1971), 6 Cal.3d 251, 98 Cal.Rptr. 790, 491 P.2d 374." *Id.*

The Public Trust Doctrine is stated succinctly in 10 McQuillin on Municipal Corporations, Sec. 28.52, p.160:

> "Parks are for the benefit of, and are held in trust by the municipality for, the public."

As stated in 10 I.L.P. *Cities, Villages, and Other Municipal Corporations*, Sec. 1761:

> "The facilities of a park district, such as its parks and boulevards, are held for the general public or the People of the State at large, and not merely for those person residing in the park district or in the immediate vicinity of the park facilities."

The public trust doctrine has been cited with approval in numerous Illinois cases, dating back to 1896:

> (a) "It follows, therefore, that the park, swimming tank and gymnasium located therein are held for the use of the citizens of the State generally and not for the exclusive use of the citizens of the park district, and the ordinance which seeks to limit the use to the citizens of the district is null and void". (*Quinn v Irving Park District*, 207 Ill. App. 449, 457 [1917])
>
> (b) "The parks and boulevards owned and controlled by the park board are held for the use of the public generally, as well as for the public in their immediate vicinity. *West Chicago Park Commissioners v. The City of Chicago,* 152 Ill. 393". (*Basker v. West Chicago Park Commissioners*, 66 Ill. App. 507, 510 [1896]).
>
> (c) "The fact that the park district, as created by the act, is carved out of a particular section or portion of another municipality does not take from it the controlling feature of its public use. Its enjoyment and amusement are not limited to the particular park

> district, but are for the benefit, health and recreation of the public generally." (*Love v. Glencoe Park District*, 270 Ill. App. 117, 120 [1933]).
>
> (d) "It is clear from the foregoing authorities that all lands, the title to which is in commissioners of park districts, are held in trust for the equal benefit of all of the people of the State, that the facilities of park districts are for the equal benefit of all the people of the State and that park districts cannot operate their facilities or permit them to be operated in such a manner that a preferential use thereof is granted to any one person or to any group of persons." (*Lincoln Park Traps v. Chicago Park District*, 323 Ill. App. 107, 114, 55 N.E.2d 123 [1944]).

The effect of the appellate court's ruling is to emasculate the Public Trust Doctrine, and to replace it with a system akin to feudalism, whereby the privilege to use a particular park or facility becomes an incident of one's birth. Moreover, it encourages park districts across the State to build Great Walls of discrimination around each district, to keep out the non-resident infidels, who are not worthy to share equally the privileges to which the residents were accidently born.

### D. The Opinion Of The Appellate Court Is Contrary To 92 Years Of Illinois Case Law Prohibiting Discrimination Based On Residency.

The leading case in Illinois holding that nonresidents may not be discriminated against by being charged higher fees is *City of Elgin v. Winchester*, 300 Ill. 214, 133 N.E 205 (1921). In that case a $300 fee was levied on nonresidents distributing advertisements. Residents were charged no fee. This Court held the ordinance invalid and went into the subject of discrimination in detail on pages 216 and 217 as follows:

> "In our judgment, under the authorities, the ordinance is void as being discriminatory between residents and nonresidents as to the payment of license fees. A citizen of the city may procure a permit without the payment of a license fee and distribute advertisements concern-

> ing sales by such citizens. Beyond question the ordinance permits local merchants to advertise by the distribution of circulars or pamphlets. **A statute or ordinance which in imposing a license tax discriminates in favor of the residents of a State or city and against non-residents of the same class is unconstitutional.** (*McGraw v. Town of Marion*, 98 Ky. 673; *Eales v. City of Barbourville*, 177 id. 216; *State of North Carolina v. Williams*, 158 N.C. 610; 40 L.R.A. (N.S.) 279, and cases cited in note; *City of Saginaw v. Circuit Judge*, 106 Mich. 32; *Clements v. Town of Casper*, 4 Wyo. 494; 25 Cyc. 610; 17 R.C.L. 510; 2 Dillon on Munc. Corp. Sec. 593, and cases cited in note; 2 McQuillin on Munc. Corp. Sec. 739; *Ward v. Maryland*, 79 U.S. 418; *Ex parte Thornton*, 12 Fed. 538.) While this court seems never to have had this precise question before it for consideration, its reasoning in cases where similar principles are involved would tend to uphold the conclusions of the decisions above cited from other States. (*City of Carrollton v. Bazzette*, 159 Ill. 284; *City of Monmouth v. Popel*, 183 id. 634; *Tugman v. City of Chicago*, 78 id. 405.) While other cases have been cited by appellee as supporting the validity of the ordinance we do not consider them controlling. By reason and the great weight of authority the conclusion must be reached, in our judgment, that the provision in question under which the fine was entered against appellant renders the ordinance discriminatory and therefore void." (Emphasis added)

The rule was reaffirmed in *American Baking Co. v. City of Wilmington*, 370 Ill. 400, 19 N.E.2d 172 (1938), and in *Larson v. City of Rockford*, 371 Ill. 441, 21 N.E. 2d 396 (1939), at page 445 as follows:

> "Arbitrary discrimination between residents and nonresidents in the issuance of licenses or the fees charged will invalidate a municipal ordinance. . . "

Numerous decisions before the *City of Elgin* case had struck down ordinances favoring residents. *E.g., Village of Braceville v. Doherty*, 30 Ill. App. 645 (1889); *Lucas vs. City of Macomb*,

49 Ill. App. 60 (1892); *City of Carrollton v. Bazzette*, 159 Ill. 284 (1896).

Because of its inclusion in A.L.R. and adoption by this Court in *People Ex. Rel Scott v. Chicago Park District*, 66 Ill.2d 65, 360 N.E.2d 773, 4 Ill.Dec. 660 (1977), the leading case nationally on this subject is *Borough of Neptune City of Borough of Avon-By-The-Sea*, 61 N.J. 296, 294 A.2d 47, 57 A.L.R. 3d 983 (1972). In that opinion the court considered the subject at length and stated:

> "We are convinced it has to follow that, while municipalities may validly charge reasonable fees for the use of their beaches, they may not discriminate in any respect between their residents and nonresidents." (57 A.L.R. 3d 994)

Supporting the doctrine that nonresident citizens of the same state may not be discriminated against are two recent cases holding the Illinois Preference Act to be unconstitutional. The Preference Act (Ill. Rev. Stat. Ch. 48, para. 39s - 1 et seq.) provided that only Illinois laborers would be used on state or other governmental construction contracts. The Act was contested in both the federal and the state courts. In the federal case, *W.C.M. Window Co., Inc. v. E. Allen Bernardi*, 730 F.2d 486 (7th Cir. 1984), the Court of Appeals held that the law violated both the commerce clause and the privileges and immunities clause of the United States Constitution. It went so far as to say that the law suffered from "prima facie invalidity." In the state case this court also found the law to be violative of the privileges and immunities clause. *People ex rel. Bernardi v. Leary Construction Company, Inc.*, 102 Ill.2d 295, 464 N.E. 2d 1019, 80 Ill.Dec. 36 (1984).

Both cases resoundingly condemned residency-based discrimination, even in a situation where there was no public trust doctrine applicable to the government involved - as there is here with park district property. Sanctioning residency discrimination is contrary to the case law of Illinois.

**E. The State Statute Which Authorizes That Fees Charged To Nonresidents Need Not Be The Same As Residents Must Be Interpreted To Mean That The Fees May Be Larger Only If Additional Burdens Are Imposed On The Park District As A Result Of Nonresident Usage.**

The trial court struck down as unconstitutional and void Section 333.23n(g) of the Chicago Park District Code, which reads as follows:

> "The Chicago Park District, to carry out the purposes of this section, has all the rights and powers over its harbor as it does over its other property, and its rights and powers include but are not limited to the following:
>
> * * *
>
> (g) To establish and collect fees for all facilities and services, and compensation for materials furnished. **Fees charged non-residents of such district need not be the same as fees charged to residents of the district.**" Ill. Rev. Stat., ch. 105, Sec. 333.23n(g) (1987) (emphasis supplied).

The Park District relies on this statute for authority for charging non-residents more than residents for mooring permits. However, in the case at bar the Park District has admitted that the cost of providing non-resident moorings is the same as providing resident moorings, and has coupled that admission with the admission that it makes a huge profit even on resident's mooring permit fees; thus, there is no rational basis for the 25% surburban surchage. A state statute cannot overrule the constitutional provisions mandating that citizens not be treated unequally without a rational basis.

It is a long-standing doctrine that if at all possible, a statute must be interpreted as being in accord with constitutional provisions; if it cannot, then it must be struck down as unconstitutional. As stated in *Douglas v. Village of Melrose Park*, 389 Ill. 98, 101, 58 N.E. 2d 864, 865 (1945):

> "Legislative enactments should be construed in a

> manner which will prevent their running counter to constitutional provisions."

Thus, in order for the statute permitting fees to be charged to nonresidents at a different rate from residents, to be constitutional on its face, it must be interpreted to mean that nonresidents can be charged more only if the Park District incurs additional burdens as a result of their usage of the facilities. To interpret the statute otherwise would not be in accord with prior case law (*Williams v. City of Chicago*, 66 Ill.2d 423, 362 N.E.2d 1030 [1977]) and the constitutional principles enunciated in the cases holding that nonresidents cannot be charged more that residents. Even under such an interpretation of the statute, which plaintiffs urge the Court to adopt, the above-cited statute is unconstitutional as applied to plaintiffs. The Park District's practice of charging non-residents a surcharge fee for a mooring permit cannot stand where there is absolutely no basis for the surcharge.

Plaintiffs point out that although the above statute applies only to the Chicago Park District, this issue affects the entire state through the Illinois Park District Code, applicable to all other park districts within the state. Section 8-1 of that Code provides:

> "Every park district shall . . . have and exercise the following powers:
>
> * * *
>
> (h) To establish fees for the use of the facilities of the district. **Fees charged non-residents need not be the same as fees charged to residents of the district.**" Ill. Rev. Stat. ch. 105, sec. 8-1(h) (1987) (emphasis supplied).

This Court must make a clear pronouncement to the entire State the arbitrary discrimination against non-residents based on these statutes shall not be tolerated. Each park district may impose a surcharge upon non-residents for the use of park district facilities only on the basis of an additional burden imposed by the non-residents.

## F. The Park District's Own Ordinances Prohibit Discrimination: Fees Must Be Uniform.

The additional(non-uniform) charge imposed on nonresidents is in direct contravention of the Park District's own code. The higher charge is mentioned in the Schedule of User Fees of the Park District in the budget of each year and carries the following footnote on all Marine Fees (R. 482 et seq.)

> "A non-resident surcharge of 25% of the base fee is assessed on all permits issued to boaters residing outside the City of Chicago."

No ordinance of the Chicago Park District exists which authorizes a 25% higher fee for non-residents. Contrary thereto, Sec. 30-8 of the Chicago Park District Ordinance provides as follows (R. 186):

> "The Park Board or the General Superintendent may fix and collect reasonable fees for the use of park facilities. Such fees may be fixed at a *uniform* rate to all users of such facility or facilities." (Emphasis added.)

Thus, a non-resident surcharge of 25% additional fee is not in the ordinance, is contrary to the Park District's own ordinances, and yet the appellate court failed to even discuss this mandate of uniformity.

## G. The Same Panel Of The Appellate Court Has Issued An Opinion Exactly Opposite To Its Opinion In This Case.

Two months prior to its decision here, the appellate court (in fact, the same Division, per Justice McNamara, with Justices Rizzi and Freeman concurring) affirmed a trial court's summary judgment in a class action striking down a surcharge imposed by the City of Chicago's Metropolitan Sanitary District on non-resident users of the system, because (i) the charges were unreasonable, and (ii) the charges were discriminatory. Stated the appellate court in *Bobrowicz v. City of Chicago*, 168 Ill. App. 3d 227, 522 N.E.2d 663, 669, 119 Ill. Dec. 1, 7 (1988):

> "The result of the surcharge is to impose upon residents

> of unincorporated areas a 50 percent higher rate than that charged residents of Chicago, or residents of municipalities to whom Chicago sells water. This, in our estimation, is an arbitrary imposition of a surcharge on the plaintiff class and clearly in violation of defendant's common law duty not to charge unreasonable or discriminatory rates."

Inexplicably, the same panel ignored its own prior case law, i.e., the common law duty (Illinois Public Trust Doctrine in this case) and the Illinois constitution, in writing its opinion in this case. The arbitrariness condemned by the appellate court in *Bobrowicz* cannot be countenanced in this case.

## III.

## THE COURT ERRED IN HOLDING THAT THE CHICAGO PARK DISTRICT CAN MAKE A PROFIT ON ITS NON-BONDED FACILITIES.

The Chicago Park District has not been given the power to raise revenue through mooring fees by the general assembly and is precluded from assessing taxes on the harbor or its personal property. Ill.Rev.Stat ch. 105, sec.333.23(p). Since they are a limited unit of local government, without the state authority to raise revenue through mooring fees, it is irrelevant whether the fees charged are called permit fees or "implied rent" (profits by definition are taxes). Stated this Court in *Ward Baking Co. v. City of Chicago*, 340 Ill. 212, 214, 172 N.E. 171 (1930):

> The city has no power to exact such a license fee solely for the purpose of raising revenue. In the exercise of police power for the purpose of regulation the authority of a municipality **is limited to such a charge for a license as will bear some reasonable relation to the additional burdens imposed upon the municipality by the business or occupation licensed and the necessary expense involved in police supervision.** [Citations.]"

Regardless of the nomenclature, the Chicago Park District is precluded from raising revenue by this means and thus the 500% profit is illegal. The mooring permit fees should be "limited to such a charge . . . as will bear some reasonable relation" to the

*Page*

## POINTS AND AUTHORITIES

PLAINTIFFS' COMBINED REPLY BRIEF TO BRIEF AND ARGUMENT FOR DEFENDANT-RESPONDENT, BRIEF OF THE ILLINOIS MUNICIPAL LEAGUE AND BRIEF OF THE ILLINOIS ASSOCIATION OF PARK DISTRICTS. ..... 1

Illinois Supreme Court Rule 341(f),(e) (6) ..... 2

I. THE CHICAGO PARK DISTRICT JUSTIFIES ITS DISCRIMINATING AGAINST NONRESIDENTS AND MAKING PROFITS ON MOORING FEES BY VIRTUE OF THREE MYTHS. ..... 3

*Paepcke v. The Public Building Commission of Chicago,* 46 Ill.2d 330, 263 N.E.2d 11, 13 (1970) ..... 3

Illinois Constitution of 1970
Article VII, Section 6(e) ..... 5

Illinois Revised Statutes
Chapter 105, Section 333.23m ..... 3

II. THE PARK DISTRICT IS NOT PERMITTED TO MAKE A PROFIT ON THE FEES CHARGED FOR THE SERVICES AND FACILITIES IT SUPPLIES. .... 6

A. The *MacNeil* Case Holds That Fees Must Be Reasonable. ..... 6

*MacNeil v. Chicago Park District,* 401 Ill. 556 (1948) ..... 6,7

B. The Bond Statute Relates to Facilities Constructed With Bond Proceeds Only And Does Not Govern Pre-Existing Nonbonded Facilities Or Harbors. ..... 8

C. Section 333.23r(1) Is Cited Out Of Context. ..... 9

*Chicago Park District v. City of Chicago,* 111 Ill.2d 7, 488 N.E.2d 968, 972 (1986) ..... 10

*Page*

Illinois Revised Statutes
Chapter 105, Section 333.23r(1) ..... 9

D. There Is Neither Logic Nor Fairness Behind Permitting The Park District To Make a Profit On Its Fees. ..... 11

Illinois Revised Statutes
Chapter 105, Section 333.19 ..... 11
Chapter 105, Section 333.23n(g) ..... 11
Chapter 105, Section 333.23s ..... 11

III. THERE IS NO JUSTIFICATION FOR CHARGING NONRESIDENTS A GREATER FEE THAN RESIDENTS FOR THE SAME SERVICES. ..... 12

A. The Park District Receives State Funds And Is Therefore Supported By Nonresidents. ..... 12

Illinois Revised Statutes
Chapter 85, Section 616 ..... 12

B. The Park District's Arguments Are Bottomed On Specious Foundations. ..... 12

(1) This case does not deal with scarce resources. ..... 13

*Baldwin V. Montana Fish and Game Commission of Montana*, 436 U.S. 371 (1983) ..... 13

*Chicago Park District v. City of Chicago*, 111 Ill.2d 7, 488 N.E.2d 968, 972 (1986) ..... 13

(2) Levying a surcharge on nonresidents is the same as denying use of the facilities ..... 13

C. The Park District's Arguments And Laws Are Misleading And Erroneous. ..... 15

(1) The Park District misstates the holding and reasoning of the *Camden* case. ..... 15

*Association of Data Processing Service Organization v. Camp*, 397 U.S. 150, 153 (1950) ..... 16

*Page*

*City of Chicago vs. Vokes*, 28 Ill.2d 475 (1963) ..... 17

*Gilligan v. Korzen*, 56 Ill.2d 387 (1974) ..... 16

*Heartt v. Village of Downers Grove*, 278 Ill. 92 (1917) ..... 16

*Illinois Housing Development Authority v. Van Meter*, 82 Ill.2d 116 (1980) ..... 16

*Jenkins v. Wu*, 102 Ill.2d 468 (1984) ..... 16

*United Building and Construction Trades Council v. City of Chicago*, 465 U.S. 208 (1984) ..... 15, 16

(3) There is no support in the cases cited for the proposition that courts have sustained the right to impose a surcharge on nonresidents. ..... 17

*Baldwin v. Fish & Game Commission of Montana*, 436 U.S. 371 (1977) ..... 17

*Bastian v. The Personnel Board of City of Chicago*, 98 Ill.2d 277 (1983) ..... 18

*Fagiano v. Police Board of the City of Chicago*, 98 Ill.2d 277 (1983) ..... 18

*Harvey Firemen's Association v. City of Chicago*, 75 Ill.2d 358 (1979) ..... 18

*Johns v. Redeker*, 406 F.2d 878 (8th Cir. 1969) ..... 18

*Martinez v. Bynum*, 461 U.S. 321 (1983) ..... 17

*McClain v. South Pasadena*, 318 P.2d 199 (Cal. App. 1957) ..... 17

*Quinn v. Irving Park District*, 207 Ill.App. 449 (1917) ..... 18

*Sturgis v. Washington*, 368 F.Supp. 38 (N.E. Wash. 1970) (three-judge court), *summarily affirmed* 414 U.S. 1057 (1973) ..... 18

*Vlandis v. Kline*, 412 U.S. 441 (1973) ..... 17

*Page*

(4) The Public Trust Doctrine in Illinois prohibits the Park District from imposing a surcharge on nonresidents. ..... 19

*Borough of Neptune City v. Borough of Avon-by-the-Sea*, 61 J.J. 296, 294 A.2d 47 (1972) ..... 20

*Gerwirtz v. City of Long Beach*, 330 N.Y.S.2d 495 (1972) ..... 20

*Hyland v. Borough of Allenhurst*, 148 N.J.Super. 437, 372 A.2d 1133 (1977) ..... 19, 20

*Hyland v. Borough of Allenhurst*, 78 N.J. 190, 393 A.2d 579 (1978) ..... 20

*Paepcke v. The Public Building Commission of Chicago*, 46 Ill.2d 330, 263 N.E.2d 11, 13 (1970) ..... 19

*People ex rel. Scott v. Chicago Park District*, 66 Ill. 2d 65, 360 N.E.2d 773, 4 Ill. Dec. 660 (1976) ..... 19

*Quinn v. Irving Park District*, 207 Ill.App. (1917) ..... 20

*Van Ness v. Borough of Deal*, 145 N.J.Super. 368, 367 A.2d 1191 (1976) ..... 19

*Van Ness v. Borough of Deal*, 78 N.J. 174, 393 A.2d 571 (1978) ..... 20

(5) The use of the word "may", in the Park District's Ordinances, must be read as mandatory, not permissive. ..... 20

*City of Chicago v. Grafman*, 42 Ill.App. 3d 139, 354 N.E.2d 572 (1976), reversed and remanded on other grounds, 68 Ill.2d 112, 368 N.E.2d 891, 11 Ill.Dec. 283 (1977) ..... 21

*Figures v. Swank*, 128 Ill.App. 2d 211, 263 N.E.2d 559, 602 (1970) ..... 20

*Heartt v. Village of Downers Grove*, 278 Ill. 92, 96 (1971) ..... 21

*Village of Woodridge v. Bohnen Intern., Inc.*, 60 Ill.App. 3d 692, 17 Ill.Dec. 931, 933, 377 N.E.2d 121 (1978) ..... 20

*Page*

*Williams v. City of Chicago*, 66 Ill.2d 423, 362 N.E.2d 1030 (1977) ..... 21

Chicago Park District Code
Section 30 - 3 ..... 20

Section 30 - 8 ..... 20

(6) The Park concedes that Article IX Section 2 of the Illinois Constitution applies to any fees that are in the nature of taxes. ..... 21

Illinois Constitution of 1970
Article IX, Section 2 ..... 21

(7) *Bobrowicz* is applicable to the case at bar ..... 22

*Bobrowicz v. City of Chicago*, 168 Ill.App.3d 227, 522 N.E.2d 663 (1988) ..... 22

Illinois Revised Statutes
Chapter 105, Section 333.23m ..... 22
Chapter 105, Section 333.23p ..... 22

IV. THE ILLINOIS MUNICIPAL LEAGUE CITES NO AUTHORITY WHICH SUPPORTS A 100% TO 500% PROFIT ON MOORING FEES ..... 22

A. Dillon's Rule Does Not Support The Chicago Park District ..... 22

*Charlton v. Champaign Park District*, 110 Ill.App.3d 554, 442 N.E.2d 915, 917, 66 Ill.Dec. 354, 356 (1982) ..... 23

Illinois Constitution of 1970
Article VII, Section 8 ..... 23

B. Impact Fees Are Limited To Costs ..... 24

Larsen & Zimet, *Impact Fees: Et Tu, Illinois?*, 21 J. Mar. L. Rev. 489, 508-09 (1988) ..... 24

*Page*

V. PLAINTIFFS HAVE NOT WAIVED ANY OF THEIR ARGUMENTS ..... 24

*Hux v. Raben* (1967), 38 Ill.2d 223, 224, 230 N.E.2d 831 ..... 25

*Schutzenhofer v. Granite Steel Co.* (1982), 93 Ill.2d 208, 211, 443 N.E.2d 563, 66 Ill.Dec. 637 ..... 25

*Spinelli v. Immanuel Lutheran Evangelical Congregation, Inc.*, 118 Ill.2d 389, 515 N.E.2d 1222, 1227, 113 Ill.Dec. 915, 920 (1987) ..... 25

CONCLUSION ..... 26

## III.

## THERE IS NO JUSTIFICATION FOR CHARGING NONRESIDENTS A GREATER FEE THAN RESIDENTS FOR THE SAME SERVICES.

The Park District devotes almost 60 percent of its brief to defending its surcharge on nonresidents. It never comes to grips with the rule in this State parks are for all the citizens of the state, not for just the residents of the district.

### A. The Park District Receives State Funds And Is Therefore Supported By Nonresidents.

The Park District's argument that the residents of Chicago solely support the District's activities and facilities and should therefore be able to discriminate against non-residents of Chicago because they do not support the activities of the Park, flies in the face of the amount the Park District receives from the State of Illinois Personal Property Replacement Fund (Ill..Rev.Stat. ch 85, Sec. 616), which in 1983 amounted to $9,164,152, as contrasted with the $3,402,113 the the Park received from its harbor operations (R. 432, "Comptroller of the Chicago Park District Annual Report 1983", p. 17). Since this tax is collected state wide and taxing districts in Cook County receive 51.65% of the proceeds of the tax, all nonresidents of the Chicago Park District subject to the Personal Property Replacement Tax subsidize the Chicago Park District each and every year just as if their real estate were taxed in Cook County. The Chicago Park District is directly and indirectly financially supported by nonresidents of Chicago.

### B. The Park District's Arguments Are Bottomed On Specious Foundations.

There are several dominant and recurring themes that pervade the arguments of the CPD that are specious.

#### (1) This case does not deal with scarce resources.

In an attempt to bring this case under *Baldwin v. Montana Fish and Game Commission of Montana*, 436 U.S. 371 (1983), the CPD claims that its harbors and facilities are "scarce" and "limited." Disregarding the interstate aspects of *Baldwin*, there

are two things wrong with this claim. First, there is nothing in the record to show it to be true. (Contrast that with the evidence produced in *Baldwin*.) Second, it is just not true. Harbors are not wasting assets. They use up only a minute fraction of the shore space available to the Park District. There are unused miles and miles of potential harbors. As this Court stated in *Chicago Park District v. City of Chicago*, 111 Ill.2d 7, 488 N.E.2d 968, 972 (1986) "This [a decrease in the waiting list] was accompanied, however, by a steady increase in the number of moorings available from 3,674 in 1978 to 5,090 in 1983." This growth is continuing. Plaintiffs ask the court to take judicial notice of the CPD's Director of Harbors announcement, circulated to the class members, that the Chicago Park District is adding a new Turning Basin Marina and has plans for additional harbors (Appendix B attached hereto, p.2). Rather then being scarce and limited facilities, CPD moorings are an expanding asset.

**(2) Levying a surcharge on nonresidents is the same as denying use of the facilities.**

One of the Park District's more pervasive sophistries is its insistence that it is not denying or limiting access to its facilities by requiring a nonresident to pay a 25% surcharge over the fee charged residents. By the District's own admission, one (and the predominant one) of the purposes of its own surcharge is to exclude nonresidents. On pages 56 to 58 of its brief the Park District tells us the extra fee will not deny nonresidents the use of its facilities. On pages 34 to 37, though, it argues that the surcharge does just exactly that, to wit: It protects residents from not having the facilities available to them because nonresidents have crowded them out. According to the caption, the surcharge is a "rational means of preserving scarce recreational amenities for the benefit of the District's residents." (CPD, p.34) The Park District's arguments have the consistency of an archer with the hiccups.

The Park District's argues that "history" has shown that it has not happened. (CPD, p.44) All "history" is not in the record in this case. If it were, it would show that the opposite were true: that it is becoming a common practice for park districts to attempt to exclude nonresidents by imposing higher fees on them, as an article from the Chicago Tribune of February 15,

1987, attached hereto as Appendix C. shows, giving lie to the Park District's statement. Lake Forest has beaches and wants to make sure nonresidents don't use them; they therefore require a $750 fee from nonresidents. As the article states:

> "City officials in Lake Forest are up front about their motives for planning to charge 15 times what they used to charge for lakefront parking: They don't want outsiders cluttering up their nice new beach."

Further giving lie to the "historical" answer of the Park District are the amici briefs. The IAPD admits that 95% of the park districts in Illinois (p.8) discriminate against nonresidents and both amici want this court to approve residency discrimination.

### C. The Park District's Arguments And Law Are Misleading And Erroneous.

The CPD has cited in its brief a number of cases not cited by Plaintiffs. Because these decisions' factual foundations are substantially and meaningfully distinguishable, their stated rationale do not stand as conflicting authority from Plaintiffs' positions.

#### (1) The Park District Misstates The Holding And Reasoning Of The Camden Case.

The Park District deliberately quotes from *United Building and Construction Trades Council v. City of Camden*, 465 U.S. 208 (1984), out of context to make it appear that *Camden* says something that it does not. On page 30 of its brief the District says:

> "Such discrimination [by a state against nonresidents] can be attacked only 'at the behest of out-of-state residents.'" 465 U.S. at 218.

The quoted phrase is lifted from language that said something completely different. The omitted language preceding the CPD's quotation is:

> "We conclude that Camden's ordinance is not immune from Constitutional review at the behest of out-of-state

residents merely because some in-state residents are similarly disadvantaged." *Id.*

As the full quotation shows, the quote by the CPD does not at all support the meaning of *Camden*. The quotation does buttress the meaning of the case as posited by Plaintiffs, however. It is encapsulated in another quotation from the case:

> "A person who is not residing in a given state is *ipso facto* not residing in a city within that state. Thus whether the exercise of a privilege is conditioned on state residency or on municipal residence he will just as surely be excluded." (79 L.Ed. at 257.)

In support of its misleading interpretation of *Camden*, the District cites (p. 30) *Association of Data Processing Service Organization vs. Camp*, 397 U.S. 150, 153 (1950). Its bearing on the instant case is nonexistent.

**(2) The Park District Misstates The Holdings Of The Cases Cited Under The Equal Protection Clause.**

The Park District cites five Illinois cases and two federal cases on pages 32 to 34 of its brief to support its argument that the discrimination against nonresidents is supported by the Equal Protection Clause. None do so.

*Jenkins vs. Wu*, 102 Ill.2d 468 (1984), dealt with the right of access to medical files and is irrelevant, both in facts and law. The *Illinois Housing Development Authority v. Van Meter*, 82 Ill.2d 116 (1980), case is even wider of the mark. It dealt with the State Housing Development Act's eligibility requirement that was based on wealth. The *Gilligan v. Korzen*, 56 Ill.2d 387 (1974), case dealt with a motor vehicle tax on residents of unimproved areas of a county where the levying authority was home rule unit and the tax was within the powers granted it. The court rested its decision on the *Heartt v. Village of Downers Grove*, 278 Ill. 92 (1917). Both *Gilligan* and *Heartt* support Plaintiffs' position in this case. *City of Chicago v. Vokes*, 28 Ill.2d 475 (1963), case is merely one of a long series of taxicab cases that have dealt with the prosecution of a taxicab driver who was not licensed in Chicago, but picked up a customer in Chicago.

> considerable skepticism upon **any** governmental conduct which is calculated **either** to reallocate that resource to more restricted uses **or** to subject public uses to the self-interest of private parties." [emphasis in originals, *Paepcke v. The Public Building Commission of Chicago*, 46 Ill.2d 330, 263 N.E.2d 11, 16 (1970); *People Ex Rel. Scott v. Chicago Park District*, 66 Ill.2d 65, 360 N.E.2d 773, 780, 4 Ill.Dec. 660, 667 (1976)]

The CPD ignores the relevant aspect of the doctrine: reallocating public resources to more restricted uses. The CPD is violating the first restriction by reallocting the mooring facilities from the general public to the residents of the CPD. Not one authority cited by the CPD supports its contention that it can promote its own residents over nonresidents. See discussion of *Paepcke* at page 4 of this reply.

The CPD cites, at pp. 54-56, intermediate-level New Jersey case law as authority for the supposed proposition that the Public Trust Doctrine does not extend to the use of man-made facilities. However, both *Van Ness v. Borough of Deal*, 145 N.J.Super. 368, 367 A.2d 1191 (1976), and *Hyland v. Borough of Allenhurst*, 148 N.J.Super. 437, 372 A.2d 1133 (1977), cited and relied on by the CPD were reversed by the Supreme Court of New Jersey, based on the Public Trust Doctrine established in *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 61 J.J. 296, 294 A.2d 47 (1972). *See Van Ness*, 78 N.J. 174, 393 A.2d 571 (1978); *Hyland*, 78 N.J. 190, 393 A.2d 579 (1978). Other cases have applied the Public Trust Doctrine to public lands *including any improvements thereon. See, e.g., Quinn v. Irving Park District*, 207 Ill.App. (1917); *Gewirtz v. City of Long Beach*, 330 N.Y.S.2d 495 (1972) (citing *Neptune City*).

The CPD cannot avoid the application of the Public Trust Doctrine which invalidates their discriminatory surcharge on non-residents.

**(5) The Use Of The Word "May", In The Park District's Ordinances, Must Be Read As Mandatory, Not Permissive.**

The CPD's assertion that its Sec. 30-3 controls the amount that can be charged (CPD, p.59) is in error. The ordinance says nothing concerning the amount of the fee or how it is to be assessed, all of which is covered in Sec. 30-8. The CPD cites no authority for its assertion that the word "may" in Sec. 30-8 is permissive. Contrary thereto, the word "may" is mandatory in Sec 30-8, requiring that fees be uniform to all users and reasonable in amount. The sentence would otherwise make no sense since "permission" is always available to those setting the fees. Under the case law the word is mandatory, otherwise the sentence would have to be considered superfluous. *Village of Woodridge v. Bohnen Intern., Inc.*, 60 Ill.App. 3d 692, 17 Ill.Dec. 931, 933, 377 N.E.2d 121 (1978); *Figures v. Swank*, 128 Ill. App. 2d 211, 263

Neither of the two federal cases is any more relevant than the five Illinois cases.

**(3) There is no support in the cases cited for the proposition that courts have sustained the right to impose a surcharge on nonresidents.**

The Park District cites three U.S. Supreme Court cases as support for its right to impose a surcharge on nonresidents. These are *Baldwin v. Fish & Game Commission of Montana*, 436 U.S. 371 (1977), *Martinez v. Bynum*, 461 U.S. 321 (1983), and *Vlandis v. Kline*, 412 U.S. 441 (1973). *Baldwin* has already been discussed at length.

The issue in *Vlandis* was not whether a right to discriminate had taken place, but whether an irrebuttable presumption of nonresidence was valid. The quotation printed by the Park District was actually part of what the court was careful to emphasize was *not* being decided in the case. The line immediately following the words quoted is:

> "We hold only that a permanent irrebuttable presumption of nonresidence . . . is violative of the Due Process Clause . . . ."

Thus *Vlandis* did not deal at all with the issues in this case. Nor did *Martinez*. The parents of Martinez lived in Mexico and Martinez left to live with his sister in Texas in order to go to school. The question was whether Texas could exclude him from the in-state tuition rates. The court held it could, but the case does not support the right of a park district to impose a surcharge on residents of other communities within the same state.

Nor do either of the two lower holdings (in California and New York) cited on page 36 of the CPD's brief support this position. In fact *McClain v. South Pasadena*, 318 P.2d 199 (Cal. App. 1957) permitted total exclusion of nonresidents from the park facilities which is contrary to Illinois Law. *See Quinn v. Irving Park District*, 207 Ill.App. 449 (1917).

The CPD cites two other tuition residency cases on page 38. Both of them were concerned with the definition of "resi-

dency", not the reasonableness of the fees. However, in *Sturgis v. Washington*, 368 F.Supp. 38 (N.D. Wash. 1970) (three-judge court), *summarily affirmed* 414 U.S. 1057 (1973), we find the court concerned with whether the nonresident was being overcharged, and the court found that nonresidents were not being charged more than their share of expenses:

> "[T]he only evidence before this court which relates to the actual cost of higher education in the State of Washington shows that the fees for a non-resident student are directly related to the cost of educating that student. Thus, the non-resident student merely pays his way and no penalty can correctly be said to have attached to the non-resident status."

*See also Johns v. Redeker*, 406 F.2d 878 (8th Cir. 1969) (same holding as *Sturgis* - non-resident students merely paying the per pupil cost of education).

The Illinois cases cited by the CPD — *Fagiano v. Police Board of the City of Chicago*, 98 Ill.2d 277 (1983), *Bastian v. The Personnel Board of City of Chicago*, 98 Ill.2d 277 (1983), and *Harvey Firemen's Association v. City of Harvey*, 75 Ill.2d 358 (1979) — similarly did not deal with the issues of this case. Both *Fagiano* and *Bastian* dealt with whether residency requirements were definite or ambiguous. In both, the courts held that the requirements contained sufficient standards to meet Illinois law. The issue in *Harvey* was what powers had been granted by the General Assembly and is obviously unrelated to the issues in this case.

### (4) The Public Trust Doctrine In Illinois Prohibits The Park District From Imposing A Surcharge On Nonresidents.

The CPD attempts to evade the Public Trust Doctrine by focusing on an irrelevant aspect of the doctrine: ceding ownership of public land to private interests. There is more than one aspect to the Public Trust Doctrine in Illinois. The public trust doctrine as enunciated by this court is as follows:

> "When a state holds a resource which is available for the free use of the general public, a court will look with